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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MARVIN FRANCOIS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

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QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY SUBSTANTIAL FEDERAL QUESTION WARRANTING THE EXERCISE OF THIS COURT'S JURISDICTION?

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PREFACE

The Petitioner was the Appellant in the Supreme Court of Florida, and Defendant in the Florida trial court. The Respondent, the State of Florida, was the Appellee in the Supreme Court of Florida and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief

(A) For the portions of the record offered to show jurisdiction in this court, which are contained in the Petitioner's Appendix.

1.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at Francois v. State, 407 So.2d 885 (Fla. 1982). There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendant claims jurisdiction based upon 28 U.S.C. §1257(3).

III

CONSTITUTION AND STATUTORY PROVISIONS

The Defendant's brief on his "Petition for Certiorari" claims error based upon the Eighth and Fourteenth Amendments of the United States Constitution. The Defendant however, has failed to recite said provisions. The Eighth Amendment provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides inter alia that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV

SUMMARY OF ARGUMENT

The Defendant's claims present no substantial federal question, and the Defendant has presented no special or important reasons for granting the writ.

V

ARGUMENT

The Defendant presents two bases for the exercise of this Court's jurisdiction: 1.) that the Supreme Court of Florida has erred within the meaning of Castaneda v. Partida, 430 U.S. 482 (1977) in refusing to permit litigation on the issue of the composition of grand juries in Dade County, Florida and 2.) that under Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, __U.S. __, 102 S.Ct. 90 (1981), remand on certified question __U.S. __, 31 Cr.L.R. 3035 (1982), the Supreme Court of Florida has erred in not vacating the present death penalties, where the Florida Supreme Court struck three (3) of seven (7) aggravating circumstances. The Defendant's complaints present no substantial federal question and do not specially warrant the exercise of this Court's jurisdiction.

A. First of all, as to the Grand Jury issue, the Florida Supreme Court ruled that the Defendant had waived any right to seek redress and review of his grand jury motion by failing to timely seek a hearing on the motion. A4-A5 (407 So.2d at 888-889). The State submits that an interpretation of state court procedure and state law is binding on federal courts, Wainwright v. Stone, 414 U.S. 21 (1973) and as a question of state law and a breach of state procedure, an issue serves as no basis for jurisdiction or review in this Court. See, Fuller v. Oregon, 417 U.S. 40 (1974); Street v. New York, 394 U.S. 576 (1969); Rice v. Sioux City Cemetary, 349 U.S. 70 (1955); Lynch v. New York, 293 U.S. 52 (1934); see, also, United States v. Frady, __U.S. __, 102 S.Ct. 1584 (1982); Engle v. Isaac, __U.S. __, 102 S.Ct. 1558 (1982). Indeed, the position of the Florida Supreme Court herein is

entirely consistent with federal law. See, Francis v. Henderson, 425 U.S. 536 (1976) (failure to raise issue of composition of grand jury before trial and absent showing of actual prejudice, right to challenge grand jury is waived); Michel v. Louisiana, 350 U.S. 91 (1955); cf. Castaneda v. Partida, 430 U.S. 482, at 485, n.4, (1977) (where state courts consider a grand jury claim on the merits over procedural objections the federal courts will also).

The controlling principles therefore are noted in Michel v. Louisiana, where the Court said:

> "It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury." [Footnote omitted].
>
> * * *
>
> "We hold only that due regard for the fair as well as effective administration of criminal justice gives the State a legitimate interest in requiring reasonable attacks on its inquisitional process[5]. . ."

---

5. "Not only may the prompt determination of such preliminary matters avoid the necessity of a second trial, but a long delay in its determination, such as here, makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness. Furthermore, a successful attack on a grand jury that sat several years earlier may effect other convictions based on indictments returned by the grand jury."

350 U.S. at 97-98 n.5.

Accord, Francis v. Henderson, 425 U.S. at 540-541, citing Michel v. Louisiana, supra; see, also, Wainwright v. Sykes, 433 U.S. 72 (1979); Yakus v. United States, 321 U.S. 414, 444 (1943) (no principle is more familiar to court than that a constitutional right may be waived by the failure to make a timely assertion of that right). The policy under Francis v. Henderson, and Michel v. Louisiana, is no more applicable than in the case at bar. The Defendant does not challenge the petit jury herein, which found him guilty of six first degree murders, beyond and to the exclusion of every reasonable doubt. The Respondent submits that there is simply no showing of prejudice to this Defendant upon this record. See, Francis v. Henderson, supra. Furthermore, the broad public policy for challenging a grand jury system is no longer served in the case at bar, since the grand jury system in Dade County, Florida is no longer on a "key man" system of selection by computer. See, Barnason v. State, 371 So.2d 680, at 681, n.1 (Fla. 3d DCA 1979), Ch. 78-455, Laws of Fla. (repealing grand jury statute).

B. With regard to the reduction of the present aggravating circumstances from seven to four, the Florida Supreme Court has repeatedly ruled that a reduction of aggravating circumstances does not invalidate a sentence of death even if there are mitigating circumstances. See, e.g., Armstrong v. State, 399 So.2d 953, at 963 (Fla. 1981); Brown v. State, 381 So.2d 690 at 696 (Fla. 1980); Hargrave v. State, 366 So.2d 1 at 4-6 (Fla. 1979). In the present case, there remain four (4) aggravating and no mitigating circumstances. Under Florida Law the present sentence is proper as a matter of law. See, e.g., Profitt v. Florida, 428 U.S. 242 (1976) (no mitigating); Fleming v. State, 374 So.2d 954 (Fla. 1979); Hargrave v. State, 366 So.2d 1, at 5 (Fla. 1979); Gibson v. State, 351 So.2d 948, at 951 (Fla. 1977) (where no mitigating

three (3) aggravating, "doubling" is irrevelant); LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978) (no mitigating); Jackson v. State, 359 So.2d 1190 at 1194-1195 (Fla. 1978) (no mitigating); Darden v. State, 329 So.2d 287 at 291 (Fla. 1976) (no mitigating); Douglas v. State, 328 So.2d 18 at 21-22 (Fla. 1976) (no mitigating); Sullivan v. State, 303 So.2d 632 at 637-638 (Fla. 1974) Overton, J., concurring, (no mitigating). The underlying premise here is expressed by the Court in State v. Dixon, 283 So.2d 1, at 9 (Fla. 1973):

> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. §921.141(7), F.S.A." [Emphasis added].

Certainly however, the Florida death penalty process under Section 921.141 Florida Statutes is not a mechanical check list, but rather is based upon a "reasoned judgment" upon the facts of each case. See, Profitt v. Florida, 428 U.S. at 250-250, 256-257, n.8 and n.14; Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977); Dixon, 283 So.2d at 10. The concern of this Court in Zant upon remand for the certified question, plainly lies with the ability of this Court or any court to ascertain the "reasoned judgment" requirement because of the uncertainty in examining a jury's sentencing determination in Georgia. See, ___U.S. at ___, 31 Cr.L.R. at 3036. However, in Florida unlike the Georgia statute in Zant, the trial judge is the sole sentencing authority and the jury's verdict is only advisory. White v. State, 403 So.2d 331 at 339-340 (Fla. 1981), cert. application pending, U.S.Sup.Ct. Case No. 81-5971. The distinction between the

trial judge as the sentencing authority and the jury as a sentencing authority may be an important distinction of the present case from that in Zant.

In Florida, as in the present case, the trial court is required to prepare an extensive order as to what grounds the Court found as aggravating and mitigating. The Florida Supreme Court, as for example in Brown v. State, supra, has specifically drawn upon this factor to sustain the death penalty even after eliminating certain aggravating circumstances, explaining that:

> "Although improper aggravating circumstances (factors enumerated 1 and 2) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless, Elledge v. State, 346 So.2d 998 (Fla. 1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here "we can know" that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003. The trial judge has told us in his order that the appellant's age, 22 years at the time of the offense and 23 years at the time of the trial, had only "some minor significance." When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances." [Emphasis added].
>
> 381 So.2d at 696.

Thus unlike Zant where a jury deliberation may be substantially unknown, in Florida the trial judge's analysis is "known" and open for inspection to determine whether or not the sentence is lawful, even with the reduction of aggravating factors. Therefore, as the Florida Supreme Court concluded in Brown, the ability to make certain a reasoned judgment is left completely intact:

> "This case then is dissimilar to Elledge, but like Hargrave v. State, 366 So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised. Given the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. Hargrave v. State, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973)." [Emphasis added].
>
> Id.

Certainly the present cause does not conflict with Zant but rather serves to properly define it.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this 2nd day of June, 1982, at Miami, Dade County, Florida.

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